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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 LYNDA D. BROWN,

11 Plaintiff,

12 v.

13 FEDERAL HOME LOAN MORTGAGE
14 CORP., *et al.*,

15 Defendants.

Case No. 2:11-CV-01228-KJD-PAL

ORDER

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17 Presently before the Court is Defendant MTC Financial, Inc.'s Motion to Dismiss (#7).
18 Plaintiff filed a response in opposition (#12) to which Defendant MTC Financial, Inc. ("MTC")
19 replied (#13).

20 **I. Background**

21 On or about November 17, 2006, Plaintiff purchased real property known as 4428 Crystal
22 Peak Drive, Las Vegas, Nevada 89115. Defendant Taylor, Bean & Whitaker Mortgage Corp.
23 ("Taylor"), acted as Lender under the Deed of Trust which secured the Note executed in conjunction
24 with the Deed of Trust.

25 On or about November 1, 2008, Plaintiff ceased making payments on the Note. Plaintiff
26 alleges that in 2008 she was offered a loan modification. Plaintiff also alleges that Taylor and MTC

1 stated in writing that no foreclosure proceedings would be taken without written notice to Plaintiff.
2 On April 13, 2009, Notice of Default and Intention to Sell was recorded by MTC, as agent for
3 Mortgage Electronic Registrations Systems, Inc. who was acting as Nominee for Taylor. On June
4 19, 2009, Substitution of Trustee, substituting MTC as Trustee was recorded. On July 16, 2009,
5 Notice of Trustee's Sale was recorded by MTC. In September 2009, Plaintiff alleges that Ocwen
6 Loan Servicing, LLC notified Plaintiff that it would begin handling servicing and modification of the
7 loan. Plaintiff also alleges that she contacted Ocwen and notified it that she was still seeking
8 modification and requested written notice of any foreclosure action. On November 20, 2009,
9 Defendant Federal Home Loan Mortgage Corp. ("Freddie Mac") purchased the Property at public
10 auction. The Trustee's Deed was recorded on December 28, 2009. Plaintiff asserts that she first
11 learned of the foreclosure sale when she was contacted by an attorney representing Freddie Mac in
12 December 2009 and was informed that foreclosure had occurred.

13 Plaintiff then filed the present complaint on May 25, 2011 asserting a claim for "Unlawful
14 Foreclosure Sale" seeking damages for the loss of the Property and equity in the Property, and
15 seeking to set aside the foreclosure sale.

16 II. Standard for a Motion to Dismiss

17 In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as
18 true and construed in a light most favorable to the non-moving party." Wyler Summit Partnership v.
19 Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
20 Consequently, there is a strong presumption against dismissing an action for failure to state a claim.
21 See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted).

22 "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
23 as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937,
24 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the
25 context of a motion to dismiss, means that the plaintiff has pleaded facts which allow "the court to
26 draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

1 The Iqbal evaluation illustrates a two prong analysis. First, the Court identifies “the
2 allegations in the complaint that are not entitled to the assumption of truth,” that is, those allegations
3 which are legal conclusions, bare assertions, or merely conclusory. Id. at 1949-51. Second, the
4 Court considers the factual allegations “to determine if they plausibly suggest an entitlement to
5 relief.” Id. at 1951. If the allegations state plausible claims for relief, such claims survive the motion
6 to dismiss. Id. at 1950.

7 III. Analysis

8 Defendant MTC has now moved to dismiss Plaintiff’s claims against MTC asserting that
9 Plaintiff’s claims are foreclosed by the statute of limitations, that Defendant MTC owed no duties to
10 Plaintiff and that Plaintiff has not adequately pled any fraud claims against it.

11 A. Statute of Limitations

12 Nevada Revised Statute 107.080 (5)(b), (c) and 107.080(6) require any action to set aside a
13 foreclosure sale for failure to abide by the statutory requirements to filed within either ninety (90) or
14 one hundred and twenty (120) days, depending on which part of the statute was allegedly not
15 complied with. In this case, Plaintiff knew no later than December 31, 2009 that her home had been
16 sold at a foreclosure sale. However, Plaintiff waited until May 25, 2011 to file the present complaint
17 seeking to set aside the foreclosure sale. Since Plaintiff did not timely file the action to set aside the
18 foreclosure, Plaintiff’s claim to set aside the foreclosure sale are dismissed.

19 B. Other Duties

20 MTC asserts that all other claims must also be dismissed, because a trustee owes no duties
21 other than those required by statute. While the Court agrees that MTC does not owe special duties to
22 Plaintiff, Plaintiff has adequately alleged that MTC breached a written agreement not to proceed with
23 foreclosure pending written notice to Plaintiff.¹ Therefore, Plaintiff may proceed with this claim.

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25 ¹ The Court recognizes the weaknesses already evident in Plaintiff’s case. First, the claim depends on a writing
26 which has not yet been produced, but presumably will be. Furthermore, it appears that this agreement would be fulfilled
by sending Plaintiff a Notice of Breach and Intent to Sale, or a Notice of Trustee’s Sale, both of which are required to be
sent by state statute. Finally, Defendant is not required to prove that the Notices required by statute are received by

1 C. Fraud

2 Plaintiff's claim that the foreclosure sale and purchase of the property by FNMA were done
3 fraudulently has not been adequately pled. Fraud has a higher pleading standard under Rule 9, which
4 requires a party to "state with particularity the circumstances constituting fraud." Fed.R.Civ.P. 9(b).
5 Pleading fraud with particularity requires "an account of the time, place, and specific content of the
6 false representations, as well as the identities of the parties to the misrepresentations." Swartz v.
7 KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007). Since Plaintiff has failed to state allegations specific
8 enough to meet this heightened pleading standard, the Court must grant the motion to dismiss this
9 claim. However, the Court grants Plaintiffs leave to amend her Complaint to state a claim for fraud
10 with the specificity required by Rule 9(b).

11 D. Damages

12 Plaintiff's remaining claim, for breach of the written agreement not to proceed with
13 foreclosure pending written notice to Plaintiff, requires that Plaintiff demonstrate damages. While
14 Plaintiff asserts that she lost "equity" in her property, the Court can take judicial notice of the fact
15 that most residential property in Clark County, Nevada had experienced an unprecedented decline in
16 value by the end of 2009. Plaintiff's original note, executed on or about November 17, 2006, was for
17 \$142,400.00. By the date of the trustee's sale on November 20, 2009, the amount of unpaid debt and
18 costs totaled \$153,272.48. The highest bid, presumably a credit bid, at the public auction was
19 \$120,591.98. The documentary record does not disclose the appraised or market value of the
20 property on either November 17, 2006 or November 20, 2009. Since it appears unlikely that Plaintiff
21 lost any equity in the property due to the decline of property values, Plaintiff is ordered to produce to
22 the Court preliminary evidence of valuation so that the Court may determine whether a valuation
23 hearing is necessary to determine whether Plaintiff, in fact, suffered damage. Plaintiff shall file the
24 preliminary response to the Court's *sua sponte* order within twenty-one (21) days of the entry of this

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26 Plaintiff, but merely that they were sent.

1 order. Defendant shall file any response within fourteen (14) days. Failure to file any response to the
2 Court's order will result in Plaintiff's complaint being dismissed with prejudice.

3 IV. Conclusion

4 Accordingly, IT IS HEREBY ORDERED that Defendant MTC Financial, Inc.'s Motion to
5 Dismiss (#7) is **GRANTED in part and DENIED in part**;

6 IT IS FURTHER ORDERED that Plaintiff's claim to set aside the foreclosure sale is
7 **DISMISSED**;

8 IT IS FURTHER ORDERED that Plaintiff's claim for fraud is **DISMISSED with leave to**
9 **amend**;

10 IT IS FURTHER ORDERED that Plaintiff file a response to the Court's order demonstrating
11 preliminary evidence of valuation within twenty-one (21) days of the entry of this order.

12 DATED this 23rd day of November 2011.

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16 Kent J. Dawson
17 United States District Judge
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